Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

94-123

In re	)	
	)	
First Media Corporation	)	
Petition for Declaratory Ruling re	)	MMB File No. 900418A
Constitutionality of the	)	
Prime Time Access Rule	)	

To: The Commission

REPLY COMMENTS OF FIRST MEDIA, L.P.

FIRST MEDIA, L.P.

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July 14, 1994

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REPLY COMMENTS OF FIRST MEDIA, L.P.

First Media, L.P. ("First Media"), by its counsel, submits the following reply to the comments of other parties on First Media's "Petition for Declaratory Ruling" filed April 18, 1990, concerning the constitutionality of the Prime Time Access Rule ("PTAR").

A. Introduction

1. The comments filed in this proceeding primarily focus not on whether PTAR is constitutional, but on the merits of PTAR (and particularly the off-network portion of the rule) as a matter of public policy. First Media concurs with those who assert that PTAR is bad public policy and should be repealed. If the Commission repeals PTAR on policy grounds -- an action First Media would welcome -- then the constitutional issue would be moot and need not be reached. However, the constitutional

question must be confronted if the Commission proposes to retain PTAR. Even a regulation that brings public interest benefits cannot stand if it unconstitutionally abridges free speech in the process.

2. In its Petition for Declaratory Ruling and its Comments in this proceeding, First Media has urged that PTAR is no longer a constitutionally permissible exercise of the Commission's regulatory power in light of the Commission's own findings and conclusions in Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), affirmed sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). There, the Commission found that technological developments have eliminated spectrum scarcity as a justification for broadcast content regulation. If the scarcity rationale no longer supports content regulation, then PTAR can survive only if it passes muster under First Amendment standards of general applicability. However, PTAR fails that test, because no substantial or compelling government interest underlies the rule.

3. Certain commenters defending PTAR dispute First Media's constitutional argument, contending essentially that Syracuse Peace Council is not authoritative, that broadcast content regulation is justified because spectrum remains scarce, and

that Red Lion is dispositive of the issue.[1/] For the reasons stated below, these arguments are unpersuasive.

B. The Findings in Syracuse Peace Council Are Valid

4. Contrary to the suggestion of some,[2/] the Commission's spectrum scarcity findings and its constitutional analysis in Syracuse Peace Council are not invalidated by the fact that the Court of Appeals affirmed that decision on other grounds without reaching the constitutional issue. As the Court itself noted, courts invariably decline to address constitutional questions when they need not do so. Syracuse Peace Council v. FCC, supra, 867 F.2d at 658. Hence, the Court's resolution of that case implies no judicial criticism of the merits of the Commission's views on the constitutional issue.[3/]

5. Likewise, the Commission's findings on spectrum scarcity in Syracuse Peace Council have not been "discredited" by Congress, as one commenter suggests.[4/] That contention

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1/ Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).

2/ "Comments of the FBC Television Affiliates Association" ("FBC Comments"), p. 5; "Comments of Viacom Inc." ("Viacom Comments"), pp. 8-9; "Comments of the Association of Independent Television Stations, Inc." ("INTV Comments"), p. 43.

3/ Indeed, Judge Starr stated in his concurring opinion that he would have upheld the Commission's constitutional judgment because, inter alia, it was based on "an adequate factual record." Id. at 681 (Starr, J., concurring).

4/ "Comments of the Media Access Project" ("MAP Comments"), pp. 18-20.

relies principally on statements in 1987 and 1989 committee reports accompanying legislation to reinstate the Fairness Doctrine. Significantly, however, that legislation was not enacted. Legislative history lacks authority when it concerns "a proposal that does not become law." Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990); United States v. Wise, 370 U.S. 405, 411 (1962).[5/]

6. Also without merit is MAP's reliance on provisions in the 1992 Cable Act for the proposition that adequate diversity does not exist in cable despite an abundance of channels. MAP Comments at 18, 20. If control of cable programming is excessively concentrated, that stems from economic dominance, not inherent spectrum limitations. Economic (as opposed to physical) barriers to mass media access do not constitutionally justify restrictions on speech. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

C. The Concept of Spectrum Scarcity Is Obsolete

7. MAP asserts that broadcast spectrum must still be considered scarce simply because the demand for broadcast frequencies exceeds the supply. MAP Comments at 21-22. But

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[5/] MAP also cites language from the Senate Commerce Committee Report accompanying the Children's Television Act of 1990 generally endorsing the concept of spectrum scarcity. MAP Comments at 19, n. 24. However, the quoted passage contains no focused analysis of the Commission's findings and conclusions in Syracuse Peace Council and is hardly dispositive of the issue.

that argument is undermined by the availability of cable transmission to reach a mass audience. Any person with the economic means can transmit video programming by cable, because cable has no spectrum limitation. Since video transmission by cable produces the same picture as video transmission by broadcast, it is irrelevant that broadcast spectrum is limited.

8. Although cable transmission and broadcast transmission produce equivalent pictures, MAP contends that the two cannot be aggregated when considering scarcity. They must be treated differently, says MAP, because unlike cable channels broadcast stations (i) are required by law to cover local issues and (ii) are free to the public. MAP Comments at 18. This contention lacks merit. First, it is circular to argue in effect that content regulation in broadcasting is constitutionally justified because broadcasters are subject to content regulation. Second, the fact that over-the-air broadcast signals are available free to the public hardly justifies imposing First Amendment restrictions on those who choose to transmit by broadcast rather than by cable. Many newspapers are likewise distributed free to the public, yet nobody would suggest that this constitutionally subjects their content to government regulation.

D. Red Lion Does Not Preclude Fresh Analysis

9. A recurrent theme of some commenters is the notion that Red Lion precludes the Commission from revisiting the spectrum

scarcity rationale.[6/] This contention, too, lacks merit. The Supreme Court itself in 1984 expressed a willingness to revisit the scarcity rationale upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376, n. 11 (1984). As this makes clear, the Supreme Court does not consider the scarcity rationale to be written in stone.[7/] Moreover, the Court does not decree the existence or nonexistence of spectrum scarcity sua sponte, but will rely on agency fact-finding expertise concerning technological developments. Thus, the Commission is not precluded from making exactly the findings and analysis it made in Syracuse Peace Council.

[6/] INTV Comments at 42-44; FBC Comments at 5; Viacom Comments at 6; MAP Comments at 22-24.

[7/] Addressing the cable television must-carry regulations in Turner Broadcasting System, Inc. v. FCC, No. 93-44 (June 27, 1994), the Court found no reason to revisit the scarcity rationale in that case because spectrum scarcity does not apply to cable television, the medium at issue there. Slip Op. at 13-14. In no way did the Court suggest that it would decline to revisit the scarcity rationale in a case involving broadcast regulations. Several Eighth Circuit judges have recently endorsed the idea that changed circumstances now make it appropriate to reevaluate the concept of spectrum scarcity. See Arkansas AFL-CIO, and the Committee against Amendment 2 v. FCC, 11 F.3d 1430, 1442 n. 12 (8th Cir. 1993) (suggesting that "the holding in [Red Lion] may well be reconsidered by the Supreme Court now that broadcast frequencies and channels have become much more available").

10. The commenters find it significant that the Supreme Court cited Red Lion with approval in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). However, the question of spectrum scarcity in light of new technological developments was not raised in Metro. As the Court indicated in League of Women Voters, it is quite prepared to review the scarcity rationale if the Commission believes that technological developments warrant such review. Moreover, the Court stated in Metro that "serious First Amendment issues" are raised if a government regulation denies a broadcaster the ability to "carry a particular program." Id. at 584, n. 36 (quoting Red Lion Broadcasting Co. v. FCC, supra, at 396). The prime time access rule does deny certain disfavored broadcasters the ability to carry particular programs during certain hours of the day.

11. Seizing upon a footnote in Metro, Viacom contends that the Commission itself has said that Syracuse does not call into question the "regulations designed to promote diversity." Viacom Comments at 9. However, what the Commission actually said is very different from the Court's footnote characterization. According to the Court (497 U.S. at 589, n. 41):

> ...the Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its "regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988).

What the Commission actually said was that its Fairness Doctrine decision did not call into question the constitutionality of

"our content-neutral, structural regulations designed to promote diversity." Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n. 56 (1988) (emphasis added). The Court omitted the critical modifying language underlined above. While the minority preferences at issue in Metro are indeed structural in nature (they relate to ownership) and content-neutral (they do not turn on the substance of programming), PTAR is not a structural regulation and is not content-neutral.[8/] Thus, the Commission has never suggested that PTAR is exempt from the Syracuse rationale.[9/]

12. Finally, two commenters assert (with apparent disapproval) that First Media's constitutional argument would eliminate all regulation of program content. Viacom Comments at 9; INTV Comments at 43, n. 103. Neither commenter explains why that would be a reason to find PTAR constitutional. More to the

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8/ In Turner Broadcasting System v. FCC, supra, the Supreme Court strongly indicated that regulations are not content-neutral if they turn, inter alia, on the "subject matter" or the "format" of programming. Slip Op. at 21. In that vein, the Court plainly signaled that regulations incorporating such program definitions as "news," "informational," and "sport[s]" will be considered content-based. Id. at 19, n. 6. PTAR incorporates exactly those kinds of program definitions.

9/ Equally misguided is INTV's suggestion that Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992), rejected similar First Amendment challenges to the finsyn rules. INTV Comments at 42. Schurz did not purport to rule on any First Amendment challenge; indeed, the court stated "we do not understand any of the parties to question the Commission's authority" to enforce the regulations at issue there. Id. And certainly Schurz did not address the spectrum scarcity rationale at issue here.

point, however, the commenters are wrong. Elimination of spectrum scarcity as justification for content regulation does not necessarily invalidate all program content regulations. It eliminates only those regulations that cannot pass muster under First Amendment standards of general applicability. Any program content regulation shown to be justified by a compelling government interest will survive. PTAR will not survive, because even its supporters can hardly claim that it serves a compelling government interest. But other regulations must be judged on their own merits.

E. Conclusion

13. The commenters opposing First Media's petition have advanced no persuasive argument in constitutional defense of PTAR. For the reasons stated by First Media, the Commission should promptly declare PTAR unconstitutional and rescind the rule.

Respectfully submitted,

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July 14, 1994

CERTIFICATE OF SERVICE

I, Joan M. Trepal, certify that on this 14th day of July, 1994, copies of the foregoing "REPLY COMMENTS OF FIRST MEDIA, L.P." were delivered or mailed, postage prepaid, to the following:

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